

COUNTRYMAN & McDANIEL

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Attorneys for defendant

HAAS INDUSTRIES, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA - SAN FRANCISCO

ONEBEACON INSURANCE COMPANY,)	CASE NO. 3:07-CV-03540-BZ
a corporation,)	
)	MOTION OF HAAS INDUSTRIES,
Plaintiff,)	INC. FOR ATTORNEY FEES WITH
)	DECLARATION IN SUPPORT
vs.)	
)	
HAAS INDUSTRIES, INC., a)	Date: September 17, 2008
corporation,)	Time: 10:00 a.m.
)	Courtroom: G
Defendants.)	Hon. Bernard Zimmerman
)	

PLEASE TAKE NOTICE that at 10:00 am on Wednesday, September, 17, 2008, in Courtroom G in the United State District Court for the Northern District of California, United States Courthouse, 450 Golden Gate Ave., San Francisco, California 94102-3483, defendant Haas Industries, Inc., will move pursuant to Fed. R. Civ. P. 54(d)(2)(A) and Civil Local Rule 54-6 for recovery of its attorney fees.

The relief sought is an Order directing that plaintiff ONEBEACON INSURANCE COMPANY pay \$46,200.00 as attorney fees necessarily incurred in the successful defense of the action

1 brought against HAAS INDUSTRIES INC. by ONEBEACON INSURANCE
2 COMPANY.

3
4 Attorney fees may be deemed "costs." *Faerfers v. Caviar*
5 *Creator, Inc.*, 2008 WL 1970325 *2 (E.D.Cal. 2008); Haas' Answer,
6 WHEREFORE Clause, para. 3. The Judgment permits recovery of Haas'
7 "costs." This motion is brought in the event the "costs" referred
8 to in the Judgment are limited to 28 U.S.C. §1920 "costs."

9
10 **MEMORANDUM OF POINTS AND AUTHORITIES**

11 Federal Rule of Civil Procedure 54(d)(2)(A), as well as Local
12 Civil Rule 54-6, provides for the recovery of attorney fees by the
13 prevailing party where permitted. In this case, recovery is
14 provided for in the underlying bill of lading.

15
16 Though under the so called "American Rule," attorney fees are
17 not generally taxable as costs against the losing party, the
18 American Rule gives way where, as here, "a party has sued under a
19 contract that includes a valid agreement for a fee award to the
20 prevailing party. (Citations omitted)." *Faerfers v. Caviar*
21 *Creator, Inc.*, 2008 WL 1970325 *2 (E.D.Cal. 2008).

22
23 This action was brought upon the allegation that "Haas took
24 possession of the shipment and issued a bill of lading . . ."
25 Complaint, para. 6.

26
27 Clause 24 of Haas Industries Bill of Lading (admitted as trial
28 Exhibit "I" and attached as Exhibit "2" to the declaration of

1 Geoffrey W. Gill filed herewith) provides in part that

2 Should Haas Industries successfully defend itself of any
3 legal actions brought by any party with an interest in
4 this shipment, Haas Industries shall be entitled to
5 reasonable attorney fees and costs.

6
7 Certainly, ONEBEACON had an "interest in" the shipment as
8 subrogee with respect to the insurance it paid as a result of a
9 missing part of the shipment. However, that interest does not
10 render ONEBEACON a "person entitled to recover under the receipt or
11 bill of lading." ONEBEACON's subrogor, PPI, was not a person
12 entitled to recover under the Carmack Amendment. Findings of Fact
13 and Conclusions of Law, para.15. Therefore, there is no
14 contradiction between ONEBEACON's liability for contractually
15 allowed attorney fees and ONEBEACON's lack of standing to sue HAAS.
16 Findings and Conclusions, para. 21.

17
18 Haas Industries successfully defended itself against the
19 action brought by ONEBEACON. Gill declaration, para. 5.

20
21 Attorney fees in the sum of \$46,200.00, based upon an hourly
22 rate of \$210.00 for 220 hours necessarily expended in the
23 successful defense of the action, are reasonable in amount and in
24 relation to the relevant circumstances. Gill declaration, para. 10.

25
26 ///

27 ///

28 ///

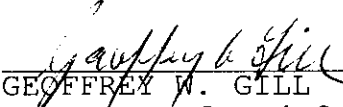
CONCLUSION

Attorney fees in the reasonable amount of \$46,200.00 have been incurred necessarily in the defense of this action, and an order awarding said attorneys fees should be entered.

Dated: July 25, 2008

COUNTRYMAN & McDANIEL
MICHAEL S. McDANIEL
GEOFFREY W. GILL

By:


GEOFFREY W. GILL
Attorneys for defendant
HAAS INDUSTRIES, INC.

DECLARATION OF GEOFFREY W. GILL
IN SUPPORT OF MOTION FOR ATTORNEYS FEES

I, Geoffrey W. Gill, being duly sworn, depose and state:

1. I am an attorney admitted to practice before this court and the courts of the state of California, as well as before numerous other federal district courts and federal courts of appeal and, additionally, am a member of the state bars of New York and Florida. Since July of 2007, I have been Of Counsel to the firm Countryman & McDaniel, counsel of record for Haas Industries, Inc., and the attorney primarily charged with the handling of this matter.

2. I make this declaration upon matters personally known to me to be true as further appears below.

3. On July 23, 2008, I attempted to contact James Attridge, counsel for plaintiff OneBeacon Insurance Company, by telephone and in his absence, left a voice message in an effort to confer regarding possible resolution of this motion for attorney fees. I followed up with a detailed email. On July 24, 2008, Mr. Attridge responded by email. A true copy of this email exchange is attached as Exhibit "1." I carefully and objectively have considered the points raised by Mr. Attridge, and believe this motion to be well founded in fact and law.

4. Attached as Exhibit "2" is a true copy of the Haas Industries bill of lading "Terms and Conditions," admitted as trial

1 Exhibit "I." Clause 24 thereof provides in relevant part:

2 Should Haas Industries successfully defend itself of any
3 legal actions brought by any party with an interest in
4 this shipment, Haas Industries shall be entitled to
5 reasonable attorney fees and costs.

6
7 5. The court's Findings of Facts and Conclusions of Law, and
8 Judgment, entered July 11, 2008, establish Haas' successful defense
9 against the action brought by OneBeacon, which claimed to have an
10 interest in the shipment an insurer of the shipment. Complaint,
11 para. 11. A true copy of the Complaint is attached as Exhibit "3."

12
13 6. I have reviewed this firm's time entries contemporaneously
14 maintained by involved attorneys as case related activities were
15 accomplished. A total of 242.8 hours of attorney time necessarily
16 was expended from inception of this firm's representation of Haas'
17 interests through review of the court's Findings of Fact and
18 Conclusions of Law, and Judgment. The necessary activities include
19 review of facts and law, and the preparation for and participation
20 in the argument of OneBeacon's motion for summary judgment and the
21 trial of the action. The firm's hourly rate has been \$210
22 throughout this period. Of that total, 22.8 hours were expended by
23 experienced transportation law attorneys Cameron Roberts and Andrew
24 Kehagiaras, who departed the firm in mid-2007. As I was successor
25 to those two attorneys, Haas is making no claim for those 22.8
26 hours, so as to avoid any claim for redundant activity.
27 Additionally, no claim is made for costs attributable to
28 transportation between the firm's Los Angeles office and San

1 Francisco, or for overnight lodging and expenses.

2

3 7. Of the remaining 220 hours (242.8 - 22.8), I performed
4 200.5 hours of case related work. I graduated Fordham University
5 School of Law in 1974 and, since that time, have devoted my legal
6 practice to transportation law, including authorship and annual
7 supplementation since 1997 of Thompson West's Federal Forms (and
8 commentary), Volumes 7 and 7A, Admiralty, and speaking on
9 transportation related legal issues before numerous academic and
10 professional groups.

11

12 8. The balance of 19.5 hours was performed by firm associate
13 Christoph Wahner, a 2005 University of San Diego School of Law
14 graduate, who also devotes his legal practice to transportation
15 law. In fact, the major practice area of Countryman & McDaniel is
16 transportation law.

17

18 9. The firm, during the relevant period, has charged a set
19 hourly rate of \$210. Based upon my knowledge, from discussions
20 with clients and attorneys, and my billing experience working with
21 several law firms, in this practice area, this rate is on the low-
22 end of rates charged in this practice area.

23

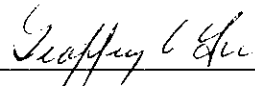
24 10. From the inception of this firm's involvement in the
25 defense of this matter, this firm has attempted to persuade
26 OneBeacon of the defenseability of Haas Industries' position. For
27 example, attached as Exhibit "4" is a copy of the firm's letter
28 validating the legitimacy of Haas' bill of lading limitation. From

1 the initial exchange of correspondence through argument of
2 OneBeacon's summary judgment motion and trial, the law and the
3 facts have remained the same.

4
5 11. In view of the above stated facts, I respectfully submit
6 that Haas' request for attorney fees in the sum of \$46,200.00
7 reflects a fee reasonable in amount and in relation to the relevant
8 circumstances.

9
10 I declare under penalty of perjury under the laws of the State
11 of California and United States of America that the foregoing is
12 true and correct.

13
14 Executed at Los Angeles, California on July 25, 2008.

15 

16 _____
GEOFFREY W. GILL

EXHIBIT “1”

Geoffrey W. Gill

From: James Attridge [jattridge@attridgelaw.com]
Sent: Thursday, July 24, 2008 9:12 AM
To: Geoffrey W. Gill
Subject: Re: ONE BEACON adv. HAAS INDUSTRIES

> Dear Jeff: I am set for a jury trial starting August 25, 2008 and if
> it
goes it is likely to be ongoing through the 3rd of September. Given that attorneys fees
are not recoverable in Carmack amendment cases (See:
Arnell v. Mayflower) and you did not request them in your answer or reference them in any
of your pleadings, including your settlement conference statement you may wish to relay to
your client that any such motion will be opposed.

Hi James:

>
>
>
> Further to my attempt to reach you by phone and voice message, please
> be advised that we are directed to move the court for attorneys fees
> pursuant to clause 24 of Haas' bill of lading terms and conditions.
> Attorneys fees total \$50,988.00.
>
>
>
> I propose a hearing date of September 3, 2008 unless you advise that
> said date is inconvenient for you. Of course, I shall be glad to
> discuss with you resolution of this issue.
>
> With kind regards,
>
> Geoffrey W. Gill
>
> Law Offices of Countryman & McDaniel
> Office Telephone: 310-342-6500
> Office Fax: 310-342-6505
> 5933 West Century Boulevard, Suite 1111, Los Angeles, CA 90045 USA.
>
> Visit <blocked::http://www.cargolaw.com/> www.cargolaw.com
>
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> is not the intended recipient or the employee or agent responsible for
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> communication in error, please notify us immediately by telephone and
> return the original message (and all copies you may have
> made) to us at the above address via regular US mail.
>
>
>
>

EXHIBIT “2”

Conditions of Contract of Carriage

1. In tendering this shipment, the shipper agrees to these Conditions of Contract of Carriage, which no agent or employee of the parties may alter, and that this shipping document is non-negotiable and has been prepared by the shipper. The shipper certifies and represents to Haas Industries that the information inserted on the face of this shipping document is complete and accurate. It is agreed among the parties involved that the conditions of contract of carriage for this shipment are governed by Haas Industries tariffs, available for inspection at Haas Industries offices, and which are hereby incorporated into this contract, and a copy of which will be supplied upon request. **NOTE:** "Shipper" on this contract means the party from whom the shipment is received, the party who requested the shipment be transported by Haas Industries, and party having an interest in the shipment, and any party who acts as an agent for any of the above. Except to the extent of any written contract between shipper and Haas Industries, this shipping document supersedes and negates any claimed, alleged or asserted oral or written contract, promise, representation or understanding between the parties with respect to this shipment.
2. In the event that shipment is tendered to Haas Industries on a straight bill of lading or any other shipping document, Haas Industries rules and regulations will supersede any rules and regulations contained on the shipping document on which the freight was tendered.
3. Shipper warrants that each package in this shipment is properly and completely described on this shipping document, is properly marked and addressed, is packaged adequately to protect the enclosed goods to insure safe transportation with ordinary care in handling, and except as noted, is in good order and condition. For articles shipped in unenclosed containers, Haas Industries shall not be liable for damage/loss unless mishandling and/or loss is evident and is so noted on the delivery receipt at time of delivery. **NOTE:** A shipment in which delivery is made in exchange for a clear delivery receipt shall be prima facie evidence of having received ordinary care in handling.
4. At time of delivery, the consignee must note on the delivery receipt any exceptions to the shipping containers that would indicate a discrepancy (shortage in the shipment or damage to the containers). The consignee may not inspect the contents of the shipping containers until the consignee signs for the shipment on the delivery receipt. **NOTE:** Such notations as "subject to inspection" and "subject to recount" are not exceptions. **NOTE:** A shipment in which delivery is made in exchange for a clear delivery receipt shall be prima facie evidence of having received ordinary care in handling. **NOTE:** *Under no circumstances shall Haas Industries be liable for loss and/or damage to external shipping containers of any kind.*
5. Haas Industries SHALL NOT BE LIABLE IN ANY EVENT FOR ANY SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES, INCLUDING BUT NOT

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LIMITED TO LOSS OF PROFITS, INCOME, INTEREST, UTILITY OR LOSS OF MARKET, WHETHER OR NOT Haas Industries HAD KNOWLEDGE THAT SUCH DAMAGES MIGHT BE INCURRED.

6. Due to the inherent nature of the transportation business, Haas Industries does not guarantee pick up, transportation or delivery by a stipulated date or a stipulated time, nor shall Haas Industries be liable for the consequences of failure to do so.
7. Overcharge claims must be received in writing by the corporate office of Haas Industries (P. O. Box 280840, San Francisco, CA 94128-0840) within one year after date of acceptance of the shipment by Haas Industries. Written notification on all other claims (except concealed loss/damage claims) must be received in writing by the corporate office of Haas Industries (P. O. Box 280840, San Francisco, CA 94128-0840) within 60 days after Haas Industries accepted the shipment. Notification of concealed loss/damage claims (i.e., claims for loss or damage discovered by the consignee after delivery and after a clear receipt has been given) must be received in writing by the corporate office of Haas Industries (P. O. Box 280840, San Francisco, CA 94128-0840) within 3 days after delivery, or if perishables, verbally within 48 hours. For damage claims and concealed loss claims, Haas Industries must be allowed the privilege to make inspection of the shipment and the container(s) and packaging material(s) at place of delivery. Claims must be perfected within 180 days after delivery or date delivery was intended. No claims will be entertained until all transportation charges have been paid. Claims may not be deducted from transportation charges and no claims may be deducted from any charges owed Haas Industries. Legal action to enforce a claim must be brought within one year after the claim has been denied in writing by Haas Industries, in whole or in part.
8. Haas Industries liability, in the absence of a higher declared value for carriage, is limited to a minimum of \$50.00 per shipment or \$0.50 per pound, per piece, of cargo lost, damaged, misdelivered or otherwise adversely affected, but in no event shall exceed the actual invoice value of the goods. This limitation is subject to provisions as published in Haas Industries governing tariffs in effect at the time of this shipment. Declared values for carriage in excess of \$0.50 per pound, per piece, shall be subject to an excess valuation charge.
9. Unless each piece of the shipment has a declared value stated and is specifically identified on the Haas Industries shipping document at the time of the shipment and is so identified on the delivery receipt as being lost, damaged, destroyed, or otherwise affected at time of delivery, Haas Industries shall be liable subject to tariff provisions in effect at the time of the shipment for the "average declared value" of the shipment. The "average declared value" of the shipment shall be determined by first dividing the total declared value of the shipment by the total weight of the shipment. This figure, multiplied by the packaged weight of the piece(s) adversely affected, shall then establish the amount of Haas Industries liability. The total declared value amount must be inserted in the DECLARED VALUE box on the face of this shipping document.

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Haas Industries liability shall in no event exceed the actual invoice value of the goods adversely affected.

10. In the event of the failure or inability of the consignee to take delivery of the shipment, Haas Industries will notify shipper in writing at the address shown on the shipping document and request disposition instructions. If the shipper fails to provide disposition instructions within 30 days after the date of Haas Industries notice, Haas Industries will return shipment to the shipper at the shipper's expense. If the shipper fails to accept delivery of a shipment thus returned, Haas Industries may, upon 30 days written notice to the shipper, dispose of the shipment at public or private sale and pay itself out of the proceeds to satisfy the transportation charges owing on the shipment. Any sums collected by Haas Industries in excess of such transportation charges will be paid to the shipper. No sale or disposal pursuant to this rule will discharge any liability or lien to any greater extent than the proceeds thereof. The shipper and the consignee shall remain liable, jointly and severally, for any deficiency.

11. Haas Industries shall not be liable for loss, damage, delay or monetary loss of any type caused by: Acts of God; public authorities acting with actual or apparent authority; strikes; labor disputes; weather; mechanical failures; aircraft failures; civil commotions; acts or omissions of customs or quarantine officials; the nature of the freight or any defects thereof; public enemies; hazards incident to a state of war; acts of terrorism; and by acts, defaults or omissions of the shipper or consignee for failure to observe the terms and conditions of the contract of carriage contained in this shipping document, including but not limited to improper packaging, marking, incomplete/inaccurate shipping instructions and the rules relating to freight not acceptable for transportation of freight acceptable only under certain conditions outlined below.

12. Unless otherwise expressly provided in Haas Industries tariffs and subject to any conditions or restrictions contained therein, the following articles will not be accepted for carriage: any shipment prohibited by law; original works of art, antiques, bonds, coins of any kind, currency, currency equivalents, furs, fur clothing, gems or stones (cut or uncut), industrial diamonds, gold or silver, coined concentrates, jewelry (other than costume jewelry), pearls, precious metals, securities (negotiable), time sensitive written material (e.g., bids, contract proposals, etc.), when the declared value exceeds \$0.50 per pound; household goods and/or personal effects, one-of-a-kind articles or models, prototypes, valuable rugs (i.e., Oriental rugs, Persian rugs) and prints or lithographs when the total declared value of the shipment exceeds \$500.00 or when the declared value exceeds \$0.50 per pound, per piece; and such other articles provided in Haas' governing tariffs and/or service guide. Haas Industries shall not be liable for any loss, damage, delay, liabilities or penalties resulting from the transportation of any of the foregoing articles, however described or misdescribed in this shipping document, and no employee or agent of Haas Industries has any authority to accept for transportation such articles or to waive the limitations herein contained.

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13. Haas Industries liability for aggregate losses at any one time at any one place is limited to \$1,000,000.00. For shipments having declared values over \$25,000.00, Haas Industries must be given advance notice prior to pick up.
14. Rates and charges for this shipment will be based on actual or dimensional weight, whichever is greater. For domestic shipments dimensional weight will be assessed on the basis of one (1) pound for each 194 cubic inches, for international shipments dimensional weight will be assessed on a basis of one (1) pound for each 166 cubic inches.
15. If this is an International shipment, a) all rules relating to liability as established by the Warsaw Convention shall apply, b) except as otherwise provided in Haas Industries tariffs or conditions of carriage, in carriage to which the Warsaw Convention does **not** apply, Haas Industries liability shall not exceed U.S. \$20.00 per kilogram or the equivalent of goods lost, damaged or delayed, unless a higher value is declared by the shipper and a supplementary charge paid, c) Haas Industries accepts this shipping document as a shipper's letter of instructions with authorization to prepare and sign on shipper's behalf an international shipping document, and d) Haas Industries reserves the option to act as agent of the carrier, instead of as a forwarder, in which event the direct carrier's tariffs shall apply to this shipment and e) the shipper may select by inserting on the face of this shipping document cargo coverage based on insurance and/or declared value for carriage.
16. Unless inserted otherwise on the face of this shipping document, the C.O.D. amount of the shipment shall be deemed to be the declared value for carriage amount. This declared value for carriage amount in excess of \$0.50 per pound, per piece, shall be subject to an excess valuation charge.
17. Collect on Delivery (C.O.D.) service is provided under the following conditions: a) shipper must identify the shipment as a C.O.D. shipment by entering the amount to be collected in the "Shipper's C.O.D. Box" on the front of this shipping document, b) shipper must specify the type of payment to be received (e.g. cash, check, money order or cashier's check) in the "Special Services Box" on the front of this shipping document and c) Haas Industries and shipper agree that Haas Industries does not guarantee nor verify that a check, money order, cashier's check or other such financial instrument is valid or negotiable. All payments are collected at shipper's risk.
18. Unless prior arrangements are made, the acceptance of cash by Haas Industries and its agents for payment of freight charges and/or C.O.D. amounts is limited to a maximum of \$2,000.00 per shipment and/or stop. Payment of freight charges and/or C.O.D. amounts in excess of \$2,000.00 must be remitted by cashier's check, certified check, money order, or consignee's check as authorized by the shipper in writing.
19. Haas Industries shall have the right to a) substitute alternate carriers or other means of transportation and b) select the routing or deviate from that shown on the face hereof.

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20. This shipment is subject to inspection by Haas Industries; however, Haas Industries is not obligated to perform such inspection.
21. The shipper and the consignee shall be liable jointly and severally for all unpaid charges payable on account of this shipment pursuant to this contract and to pay or indemnify Haas Industries for claims, fines, penalties, damages, costs (storage, handling, reconsignment, return of freight to shipper, etc.) or other sums which may be incurred by Haas Industries by reason of any violation of this contract or any other default of the shipper or consignee or their agents. Haas Industries shall have a lien on any goods shipped for failure to pay charges payable on account of this shipment pursuant to this contract. Haas Industries may refuse to surrender possession of the goods until such charges are paid. Should Haas Industries bring legal action for the enforcement of this contract or collection of any sums due and payable under this contract, Haas Industries shall be entitled to reasonable attorney fees and costs.
22. All invoices are due and payable in 14 days from the invoice date.
23. Shipper and consignee shall hold Haas Industries and its agents harmless for loss/damage/delay or any monetary losses which are a result of auxiliary services including but not limited to local cartage, crating, uncrating, packing, and unpacking which are requested by the shipper or consignee and arranged by Haas Industries as a customer service unless such services are actually performed by Haas Industries or its agents. Such limitation of liability shall extend to the selection by Haas Industries of the providers of the auxiliary services. Auxiliary services are those which are performed prior or subsequent to transportation and which may be billed directly by the provider of the services or by Haas Industries. Provider of auxiliary services are contractors for the shipper or consignee and are not agents for Haas Industries. Local cartage is the movement of unpackaged/uncrated freight. **NOTE:** Under no circumstances will the liability of Haas Industries for any monetary loss which is a result of any auxiliary services performed by Haas Industries or its agents be greater than the liability contained in this contract.
24. Should Haas Industries successfully defend itself of any legal actions brought by any party with an interest in this shipment, Haas Industries shall be entitled to reasonable attorney fees and costs. **NOTE:** In lieu of legal actions, any disputed claim not greater than \$15,000.00 is to be settled through binding arbitration submitted to the Transportation Arbitration Board or the American Arbitration Association under its cargo claim arbitration program. An alternative arbitrator is to be selected by Haas Industries if the claim is unacceptable for arbitration by both the above arbitrators.
25. Shipments are subject to security controls by carriers and, where appropriate, by government agencies. Copies of shipping documents will be retained until the shipment is delivered.

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INDIRECT AIR CARRIER STANDARD SECURITY PROGRAM

"Cargo items tendered for air transportation are subject to aviation security controls by air carriers and when appropriate, other government regulations. Copies of all relevant shipping documents showing the cargo's consignee, description, and other relevant data will be retained on file until the cargo completes its air transportation."

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EXHIBIT “3”

JAMES ATTRIDGE (SBN124003)
LAW OFFICE OF JAMES ATTRIDGE
1390 Market Street, Suite 1204
San Francisco, CA 94102
Telephone: (415) 552-3088
Facsimile: (415) 522-0513

Attorney for Plaintiff One Beacon Insurance
Company

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA- SAN FRANCISCO

ONE BEACON INSURANCE COMPANY, a
corporation

Plaintiff,

v.

HAAS INDUSTRIES, INC., a corporation

Defendants

CASE NO. 07 3540

COMPLAINT FOR DAMAGE TO
CARGO IN INTERSTATE COMMERCE
49 USC 14704a), 49 USC 14706

Plaintiff alleges:

FIRST CLAIM FOR RELIEF

(Cargo Loss)

1. Plaintiff One Beacon Insurance Company, is and at all times material was, a corporation engaged in the business of insurance and authorized to do business within this judicial district.
2. Defendant Haas Industries, Inc. was at all times material a corporation licensed to do business with its headquarters located in South San Francisco, California. Haas engaged in business as a common carrier, contract carrier and freight forwarder. As

1 of June 30, 2005, Haas had received authority from the United States Department
2 of Transportation to engage in transportation as a contract carrier, but had not
3 received authority to engage in transportation as a common carrier.

4 3. Jurisdiction is predicated upon 28 USC 1331 and 1337b).

5 4. Venue is proper because defendant's headquarters is located in San Mateo County.

6 5. In or about June, 2005, plaintiff's insured, Professional Products, Inc. purchased a
7 quantity of computer wafers from Omneon Video Graphics of Sunnyvale,
8 California for resale to Leizure Associates, Inc. of Baltimore, Maryland. Pursuant to
9 the terms of sale title was to pass to Professional Products, Inc. free on board at
10 Omneon's dock in Sunnyvale.

11 6. On or about June 30, 2005 Haas took possession of the shipment and issued a bill of
12 lading for transportation in interstate commerce.

13 7. Plaintiff is informed and believes that Haas had not entered into a contract carriage
14 agreement with either Omneon or Professional Products, Inc. as defined in 49 USC
15 14101b).

16 8. Plaintiff is informed and believes that Haas brokered the shipment to another
17 carrier. Plaintiff is further informed and believes that as of June 30, 2005 Haas had
18 not been granted authority to act as a broker by the United States Department of
19 Transportation as that term is defined at 49 USC 13102(2).

20 9. At all times material, Haas did not maintain a private tariff which provided shippers
21 a menu of options permitting them to chose between a variety of freight rates tied to
22 different levels of liability for which Haas would be responsible should the freight
23 be lost or damaged.

24 10. On or about July 8, 2005 the shipment arrived at destination one pallet short. The
25 lost product has never been delivered.

26 11. Prior to the shipment of the herein described cargo and prior to any loss thereto,
27 plaintiff issued its policy of insurance whereby it agreed to indemnify the owner of
28 said cargo, and its assigns, against loss of said cargo while in transit, and plaintiff

1 has therefore become obligated to pay and has paid to the person entitled to
2 payment under said policy the sum of \$105,705.00 on account of the herein
3 described loss.

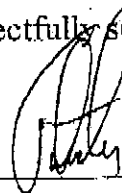
4 12. Plaintiff has therefore been damaged in the amount of \$105,705.00, no part of which
5 has been paid despite demand therefore.

6
7 WHEREFORE, plaintiff prays for relief as follows:

- 8 1. For damages in the amount of \$105,705.00.
9 2. Interest at the applicable rate since the date of loss.
10 3. For attorneys fees pursuant to 49 USC 14704a).
11 4. For whatever further relief the court deems warranted.

12
13 Dated: July 9, 2007

Respectfully submitted,



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16 James Attridge, Counsel for Plaintiff
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EXHIBIT “4”

LAW OFFICES

Countryman & McDaniel

MICHAEL S. McDANIEL^{***}
BYRON E. COUNTRYMAN
CAMERON W. ROBERTS[†]
ANDREW D. KEHAGIARAS^{††}
CHRISTOPH M. WAHNER

[†]ALSO ADMITTED IN WASHINGTON
^{††}ALSO ADMITTED IN MICHIGAN
^{***}PROCTOR IN ADMIRALTY

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www.cargolaw.com

11 August 2006

Via Facsimile to (415) 522-0513

James Attridge, Esq.
1390 Market Street
Suite 1204
San Francisco, CA 94102

Re: ***HAAS Industries re: Claim of One Beacon Insurance Company***
HAAS Bill of Lading No. : 1590479
Date of Loss : July 8, 2005
Claim Amount : \$105,705.00
Our File No. : 4584-901

Subject: **Fair Opportunity Doctrine**

Dear Jim:

In a final attempt to persuade you that your interpretation of the case law is incorrect, I refer you to the case of *Ferrostaal vs. M/V Sea Phoenix*.¹ Unlike the unpublished cases that One Beacon relies on, *Ferrostaal* articulates a thoughtful history of fair opportunity doctrine from the early Supreme Court cases in the 1865 to seminal the post-Carmack case of *New York, New Haven and Hartford Railroad Company vs. Nothngale*.²

As the *Ferrostaal* explains, *Nothngale* was a railroad case and gave no indication that the doctrine extended beyond rail carriage. The phrases "fair opportunity to choose" and "reasonable opportunity to discover" were *dicta*. The decision upheld the rights of an individual passenger who *never* saw the bill of lading, not a commercial shipper, as the one presented in our case.³

¹447 F.3d 212 (2006).

²346 U.S. 28 (1953).

³See *Ferrostaal* at 221-222.

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It is noteworthy that *Nothingale* relies on the reasoning of *Boston & Maine R. Co. v. Piper*, 246 U.S. 439, 444-445 (1918) that in turn relies on *Adams Express Co. v. Croninger*, 226 U.S. 491, 509, 510 (U.S. 1913) that in turn relies on *York Mfg. Co. v. Railroad*, 3 Wall (1865). But, it is nothing short of ironic that *York* makes no mention of a "fair opportunity" or a "tariff." *York* simply enforces the limitation based on a "special contract."

Subsequent to *Nothingale*, the court in *Anton vs. Greyhound Van Lines*,⁴ another rail passenger case, stated that there needed to be a "fair opportunity to choose between higher or lower liability . . ."

Following *Nothingale* and *Anton*, the Seventh Circuit case of *Hughes*, a household goods case, cited to *Anton* stating the test as: "a fair opportunity to choose between alternative levels of coverage" or "to give the shipper reasonable opportunity to choose between two or more levels of liability."⁵ It is undisputed that the Ninth Circuit follows the Seventh Circuit with respect to the fair opportunity test in cases of household goods.⁶

The HAAS bill of lading and the terms and conditions on its website, put the shipper on notice of the limitation of liability. In addition, they give the shipper a fair opportunity to choose between the \$0.50 per lb. limitation or a declared value with a correspondingly greater charge. Simply put, the language on the face of the HAAS bill of lading tracks *Nothingale*, *Anton* and both *Hughes* cases. The issue is not rates published in a tariff, but the opportunity to choose between two or more levels of liability. The test, as stated, does not require the *ad valorem* freight rate be published in a tariff.

Given the course of dealing and the sophistication of the parties in our case, the shipper had both reasonable notice of the liability limitation and the opportunity to obtain information necessary to making a deliberate and well-informed choice.⁷ It is undisputed that the shipper did not inquire or request that information. Accordingly, the signed bill of lading is the *best evidence* that the shipper made an absolute, deliberate, and well-informed choice to accept HAAS's \$.50 per pound limitation.

⁴591 F.2d 103, (1st Cir. 1978).

⁵*Hughes vs. United Van Lines, Inc.*, 829 F.2d 1407, 1415 (7th Cir. 1987) citing *Anton*.

⁶*Hughes Aircraft Co. v. North American Van Lines, Inc.*, 970 F.2d 609, 612 (9th Cir. 1992).

⁷The Ninth Circuit has held that "actual possession of the bill of lading" is unnecessary when a shipper is "familiar as a matter of commercial practice with the terms and limitations of Sea-Land's bill of lading." *Sea-Land Serv. v. Lozen Int'l, LLC*, 285 F.3d 808, 815 (9th Cir. 2002).

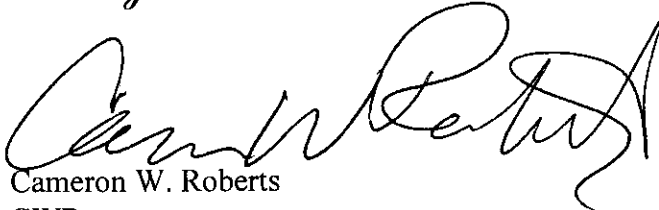
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Nevertheless, my client is interested in resolving the matter short of litigation. To that end, I am willing to recommend settlement in the amount of \$15,000.00 or, in the alternative, I suggest we have the matter arbitrated by an individual or panel that is competent to understand the legal issues.

With kind regards,

Countryman & McDaniel

A handwritten signature in black ink, appearing to read "Cameron W. Roberts". The signature is fluid and cursive, with a large, stylized initial "C" and "R".

Cameron W. Roberts
CWR:mp